No. 5373

In the

United States Circuit Court of Appeals

For the Ninth Circuit

E. CLEMENS HORST COMPANY, a corporation
Plaintiff in Error

vs.

THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation
Defendant in Error

Brief of Plaintiff in Error

Upon Appeal from the United States District Court for the District of Oregon

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GENERAL STATEMENT

This is a law action to recover on an employer's liability contract of insurance.

Defendant in error, hereinafter referred to as the Insurance Company, filed a demurrer to the amended complaint of plaintiff in error, hereinafter called the Horst Company. The demurrer was sustained, and the Horst Company electing to stand on its

amended complaint, judgment on the pleadings was entered. (R. 93)

The correctness of Judge Bean's ruling sustaining the demurrer is the sole question involved.

The essential facts involved in this case have been covered in a stipulation. (R. 48)

Briefly summarized they are as follows:

It is agreed that the Horst Company is a corporation; that it has been engaged in the growing and selling of hops, operating large hop yards in Marion County, Oregon, at which place it annually employs large numbers of persons in the harvesting of its crops.

On July 27, 1925, the Horst Company and the Insurance Company entered into an employers' liability contract of insurance, copy of which policy of insurance together with all the endorsements thereon, is attached to the complaint of the Horst Company as Exhibit "A". (R. 17)

Relevant Terms of Policy

Under this policy the Insurance Company agreed to indemnify the Horst Company

> "against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries suffered as the result of an accident occurring while this policy is in force, *by an employee* or employees of the assured, *while at or about the work of the assured* described in warranty four, which for the purpose

> of this insurance *shall include all operations necessary, incident or appurtenant thereto, or connected therewith,* whether such operations are conducted at the work place defined and described in the warranties, *or elsewhere,* in connection with or in relation to such work places."

Warranty 4 merely describes the type of employment covered by the policy, and for this cause requires consideration of the following language only:

"Hop-picking — including all work incidental thereto."

The policy likewise contains certain special endorsements, one of which provides that it is the intent of the policy

> "to cover all the operations of the assured in Oregon, whether or not such operations are declared under warranty four,"

and that the policy

> "covers employees of the assured who are hired and employed in Oregon, wherever such employees may be temporarily sent in the United States of America or Canada, in the performance of their duties",

and a further provision that "the word Employees" wherever used in the policy

> *"shall include all piece work* and tenants under contract or sub-contract",

and contains an endorsement raising the liability from $5,000.00 to $30,000.00 for injury to one person, and from $10,000.00 for loss from any one accident to $140,000.00.

Under Item 2, entitled "Location of all Shops, Yards, Buildings, Premises, or other places of this Assured, by Town or City, with street and number" appears the following answer: "Anywhere in Marion and Polk Counties, Oregon." (R. 30)

Terms of Rogans' Employment

The terms and conditions under which the Rogans were employed by the Horst Company are so clearly set forth in paragraphs IV and V of the Stipulation (R. 50-51) that we quote them in full:

> "IV.
>
> That in accordance with its usual custom, the Horst Company upon the approach of the harvest season in the year 1925, printed and extensively distributed a circular, advertising for two thousand hop pickers, it being stated in said circular among other things that the Portland office of the Horst Company would be located at the Coffey & Sheehy Hardware and Sporting Goods Store, 223 Morrison Street, and that as a part of its agreement with those who were to become its hop pickers, it would haul them, free of charge, from Salem or Independence to its ranch, provided they arrived at either of said stations on or between dates of August 29th and August 31st inclusive; it being further stated in said circular that picking was to start September 1, 1925, and that pickers would be required to deposit $1.00 for each room or tent for two or more pickers, and that said deposit would be refunded after the arrival of hop pickers at plaintiff's hop yards;
>
> That on August 5, 1925, and pursuant to the terms of said circular, plaintiff, through its

agent, Helen B. Henderson, at its said Portland office, entered into a contract with W. P. Rogan and Margaret E. Rogan, his wife, under the terms of which contract the said Rogans were to pick hops, commencing September 1, 1925, at plaintiff's hop yards in the Eola District of Marion County, Oregon, for the sum of....cents per pound picked, plaintiff by said contract agreeing with the said Rogans to transport them without charge from the railroad station at Salem, Oregon, to the Eola Ranch and hop yards of plaintiff, and plaintiff accepted from the said Rogans the sum of $1.00 as a deposit for the use of Cabin No. 47 in Camp 1, at plaintiff's said hop yards, and the said Henderson thereupon entered the names of the said Rogans in her registry book, with the number of the above named cabin and camp assigned to the said Rogans, and reported same to the manager of the Horst Company at said Eola Ranch. The only work to be performed by said Rogans under said contract was to pick hops for plaintiff at....cents per pound, and no such work was actually performed by either of said Rogans for plaintiff.

"V.

That on August 29, 1925, the said Rogans came from the City of Portland, Oregon, to the Southern Pacific Railway Station at Salem, Oregon, where they were met by agents of the Horst Company with a motor truck for the purpose of being transported from Salem to said Eola Ranch as aforesaid, said truck being equipped with a driver's seat in front, and a rear platform extending from the driver's seat to a point beyond the rear wheels of said truck a distance of approximately ten feet, and seven or eight feet in width, and without railing or seats for passengers; that said Rogans and some fifteen other persons in addition at that time and

place boarded the said truck with their luggage, and while being by said truck of plaintiff transported to the Eola hop yards of the Horst Company, and when about six miles from Salem, the said Rogans were thrown or fell from said motor truck and from a trunk of the said Rogans placed upon said truck and upon which the Rogans were theretofore sitting, to the ground, the trunk of the said Rogans being likewise thrown or falling from said truck and upon said Rogans; that in and by reason of said fall the said Margaret E. Rogan was injured, suffering an intra-capsular fracture of her left hip and a compound longitudinal fracture of her right leg above the ankle, and said W. P. Rogan was injured, suffering a dislocation of his left shoulder joint and a fracture of his left arm between the elbow and the shoulder; that the circumstances under which the said Rogans were so injured, other than such facts as are herein agreed upon, are left to proof by the parties hereto."

Actions Instituted

On October 27, 1925, the Rogans instituted actions against the Horst Company in the Multnomah County Circuit Court, Mrs. Rogan seeking to recover $20,700.00 and Mr. Rogan $5,150.00.

Immediately after the accident the Horst Company gave written notice of the accident to the Insurance Company, and after the institution of the actions called upon the Insurance Company to defend same, which the Insurance Company refused to do, disavowing at the time any liability under its policy.

Thereafter, on November 30, 1925, the actions of the Rogans were settled and dismissed upon payment by the Horst Company of the sum of $4,000.00, a written agreement covering the settlement having been entered into between the Horst Company and the Insurance Company, copy of which was attached to the Stipulation. (R. 56)

This action was thereupon filed to recover the moneys paid by the Horst Company in settlement of the Rogan cases.

Demurrer Filed

The Insurance Company filed a demurrer to the Horst Company's amended complaint, on the ground that it failed to state facts sufficient to constitute a cause of action.

The Insurance Company relied on two propositions in support of its demurrer.

1. That the Rogans, at the time of the accident, "were not employees of, and were not in the employ of" the Horst Company, "within the terms of the policy of insurance", and

2. That said accident and injury to said Rogans were not covered or intended to be covered by the said policy. (R. 89)

Ruling of the Court

In his original opinion, rendered orally, Judge Bean held that the question of whether the Rogans were employees at the time of their injury was im-

material, and that the controlling question was whether at the time the Rogans were injured they were at work hop picking, or in any work incident to or connected therewith and that inasmuch as they had not reached the hop yard, and their work was not to begin until the first day of September, two days after they were injured, the liability of the insurance company had not attached, the demurrer should be sustained. (R. 64)

In a subsequent written memorandum the Court reaffirmed his conclusion. (R. 71-75)

Contention of Horst Company

Based upon the facts set forth in the amended complaint, (R. 76) as supplemented by the written stipulation, (R. 48) the Horst Company claims that it is entitled to recover from the Insurance Company for the following reasons:

1. That the Rogans were employes of the Horst Company on August 29, 1925, the day the accident happened, under a definite or absolute contract of employment, and

2. That although the Rogans received their injuries through an accident which occurred on their way to work, the accident nevertheless arose out of or in the course of their employment, and while the Rogans were "at or about the work of the assured", or performing an operation "necessary, incident or appurtenant thereto, or connected therewith", be-

cause at the time of the accident the Rogans were being transported to their work by the Horst Company, their employers, as a part of their contract of employment.

ASSIGNMENT OF ERRORS

The errors assigned (R. 95) raise in a number of ways the two contentions of the Horst Company heretofore stated. The general proposition relied upon by the Horst Company is that the Court erred in sustaining the demurrer of the Insurance Company, on the theory that at the time the Rogans were injured they were not performing an operation "necessary, incident or appurtenant . . . or connected" with the work of the assured.

POINTS AND AUTHORITIES

I.

While the terms of an indemnity policy constitute the measure of liability, where two constructions are possible the one sustaining liability should be preferred.

Imperial Fire Insurance Co. v. County of Coos, 151 U. S. 452, 38 L. Ed. 231, 235.

Liverpool, London & Globe Assurance Co. v. Kearney, 180 U. S. 132, 45 L. Ed. 460, 462.

Wright v. Aetna Life Insurance Co., 10 Fed. (2nd) 281.

II.

The natural and obvious meaning of an insurance contract is to be preferred, courts leaning to that construction which will not permit an insurance company to take advantage of an ambiguity.

Standard Life & Accident Co. v. McNulty, 157 Fed. 224, 226.

St. Paul Fire & Marine Insurance Co. v. Ruddy, 229 Fed. 189, 193.

III.

A contract of hiring becomes complete where one is employed by an agent of the employer, authorized to make the employment, when the applicant agrees to the terms and presents himself in proper time at a place designated by the employer.

Wells v. Clark & Wilson Lumber Co., 114 Ore. 297, 235 Pac. 283, 290.

IV.

One may be under such a contract with another as to be a present employee, although the actual work incident to the employment may not be begun until a future date.

Wells v. Clark & Wilson Lumber Co., 114 Ore. 297, 235 Pac. 283, 290.

V.

Where the contract included transportation as one of its terms, and an accident happened during the course thereof, and a short time before work was to begin, nevertheless it occurs in an operation necessary, incident or appurtenant to the work of the employee.

Cudahy Packing Co. v. Parramore, 263 U. S. 418, 68 L. Ed. 366, 370.

Novack v. Montgomery Ward & Co., (Minn.) 198 N. W. 290.

Stratton v. Interstate Fruit Co., (S. D.) 199 N. W. 117, 119.

Indian Hill Club v. Industrial Commission, (Ill.) 141 N. E. 871, 873.

In Roberts Case, (Me.) 126 Atl. 573.

VI.

The relationship of employer and employee exists where the employer retains the right to direct not only what shall be done, but how it shall be done.

Employers' Indemnity Company v. Kelly Coal Co., 149 Ky. 712, 41 L. R. A. (N. S.) 963, 967.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Ore. 340, 344, 138 Pac. 862.

Harvey v. Corbett, 77 Ore. 51, 60; 150 Pac. 263.

VII.

The general rule that where an employee receives an injury by accident on his way to work, before reaching the employer's premises, such accident cannot be said to arise out of or in the course of the employment, is subject to an exception if at the time of such accident the employee is being transported by the employer, as a part of the contract of employment.

Universal Cement Co. v. Spirakis, (Ind.) 137 N. E. 276, 277.

Sala v. American Sumatra Tobacco Co., 93 Conn. 82, 83; 105 Atl. 346.

Swanson v. Latham, 92 Conn. 87, 101 Atl. 492.

Littler v. Fuller Co., 223 N. Y. 369, 371.

American Coal Mining Co. v. Crenshaw, (Ind.) 133 N. E. 394.

Jones v. Casualty Reciprocal Exchange, (Tex.) 250 S. W. 1073, 1074.

Dunn v. Trego, (Pa.) 124 Atl. 174.

Lampert v. Siemons, 197 N. Y. S. 25, 26.

Dominguez v. Pendoia, (Cal.) 188 Pac. 1025, 1026.

VIII.

The rules which apply to contracts generally are applied in determining whether the contract which

must underlie the operation of the workmen's compensation law exists.

Kackel v. Serviss, 167 N. Y. S. 348.

28 R. C. L., pp. 737, 755, 760. 802.

IX.

An injury occurring to an employee in the course of transportation by the employer, pursuant to one of the terms of employment, originates in the work of the employee, and is incidental to the work, because contemplated by it.

Western Indemnity Co. v. Leonard, (Tex.) 231 S. W. 1101, 1103.

Swanson v. Latham, 92 Conn. 87.

ARGUMENT

Rules of Construction

We fully appreciate that there is no necessity of setting forth in detail the rules of construction to be applied in order to determine the meaning of any term or condition in an employers' liability policy. Hence, we deem it sufficient to briefly refer to some of the cases in which these rules have been discussed.

While we concede that, as stated by Mr. Justice Jackson in *Imperial Fire Insurance Company v. County of Coos,* 151 U. S. 452, 38 L. Ed. 231, 235, if an assured cannot bring himself within the terms and conditions agreed upon in the policy, he is not entitled to recover for a loss, the terms constituting the measure of the insurer's liability, this rule, as said by Mr. Justice Harlan in *Liverpool London & Globe Assurance Co. v. Kearney,* 180 U. S. 132, 45 L. Ed. 460, 462, is subject to the exception that where a policy is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. To the same effect see Mr. Justice Strong in *Aetna Insurance Co. v. Boon,* 95 U. S. 117, 24 L. Ed. 395, 398, and Mr. Justice Sutherland in *Mutual Life Insurance Co. v. Hurni Packing Co.,* 263 U. S. 167, 68 L. Ed. 235, 238. See also *Ocean Accident and Guaranty Corporation v. Old National Bank,* 4 Fed. (2nd) 753, 755.

As stated by Circuit Judge Gilbert, in *Aetna Insurance Company v. Sacramento-Stockton S. S. Co.,* 273 Fed. 55, 58,

> "It is the language of the Insurance Company we are called upon to construe, and 'it is both reasonable and just that its own words should be construed most strongly against itself.'"

Another way of expressing the same rule was used by Circuit Judge Buffington in *Wright v. Aetna Life Insurance Co.,* (C. C. A. 3rd Cir.) 10 Fed. 2nd, 281, where the Court held that

> "When the words of a policy are without violence, susceptible to two interpretations, that which will sustain the indemnity it was the object of the assured to obtain should be preferred."

Obvious Meaning Preferred

Circuit Judge Sanborn, in *Standard Life & Accident Co. v. McNulty,* (C. C. A. 8th Cir.) 157 Fed. 224, 226, held not only that the terms of an insurance contract are to be taken and understood in their plain, ordinary and popular sense, but that

> "The natural, obvious meaning of the provisions of the contract should be preferred to any curious, hidden sense, which nothing but the exigencies of a hard care, and the ingenuity of a trained and acute intellect will discover."

To the same effect see *Delaware Ins. Co. v. Greer,* (C. C. A. 8th Cir.) 120 Fed. 916, 921, 61 L. R. A. 137.

Any Ambiguity Resolves Against Insurer

In *St. Paul Fire and Marine Ins. Co. v. Ruddy,* (C. C. A. 8th Cir.) 229 Fed. 189, 193, Circuit Judge Kenyon said:

> "If a policy is ambiguous or doubtful, or language calculated to mislead is used, courts lean to a construction that will not permit the insurance company to take advantage of the ambiguity."

To the same effect see Circuit Judge Hough's decision in *Globe & Rutgers Fire Ins. Co. v. Winter-Garden Co.,* 9 Fed. 2nd, 227, 229; *Hearin v. Standard Life Ins. Co.,* 8 Fed. 2nd 202, 203; *Cedargren v. Massachusetts Bonding & Ins. Co.,* (C. C. A. 8th Cir.) 292 Fed. 5-7.

Narrow Construction Not Favored

In *Ford Hospital v. Fidelity & Casualty Co. of New York,* (Neb.) 183 N. W. 656, the Court construed a liability policy, and in commenting thereon said:

> "The Fidelity & Casualty Co., insurer, is engaged in the business of writing liability insurance for profit; it is not a favorite of the law, with the standing of an individual who becomes surety or guarantor as mere accommodations. No narrow or technical construction of the pleadings in the former action for damages, or of the policy in the case at bar, is permissible to defeat the insurance."

Rules of Construction Applied to Employers Liability Policy

In *London Guaranty & Accident Co. v. Ogelsby,* 231 Pa. 186, 80 Atl. 57, it was held that in construing employers' indemnity policies the courts have held that they must be construed "as strongly as possible against the company issuing the policy."

The case of *Charles Wolf Packing Co. v. Travellers Ins. Co.,* (Kans.) 146 Pac. 1175, 1177, involved an employers' liability insurance policy, and the Court said:

> "This policy should be construed most strongly against the defendant and in favor of the plaintiff. (Citations.)"

I.

ROGANS WERE EMPLOYEES

As indicated in our opening statement, one of the principal legal questions involved in this case is whether, under the admitted facts, the Rogans were employees of the Horst Company on August 29, 1925, the date the accident occurred. Counsel for the Insurance Company, in support of their claim that the Rogans were not employees, relied on three Oregon decisions. They are:

Wells v. Clark & Wilson Lumber Co., 114 Ore. 297, 235 Pac. 283.

Susznik v. Alger Logging Company, 76 Ore. 189, 147 Pac. 922.

Putnam v. Pacific Monthly Company, 68 Ore. 36, 130 Pac. 986, 136 Pac. 835.

In our opinion the distinction pointed out by the late Judge Stapleton, and confirmed by Justice McBride in the Wells decision, squarely sustains our contention that the Rogans were employees of the Horst Company at the time the accident occurred. In that case Mr. Justice McBride in the course of his opinion (p. 290) said:

> "Judge Stapleton, who tried the case below, in a charge which vindicates his well earned reputation as a careful and profound judge, drew a distinction in this case wherein an employment *agent,* having reason to believe that employment might be secured at a particular place, *without orders from the possible or probable employer, sent* an applicant to that place to secure employment, and *another case* wherein the *employer*

had *expressly authorized* the employment *agent* to send him a *person* for a *particular job,* holding, substantially, that in the *latter instance* the contract of hiring became *complete* when the applicant appeared at the *place designated* (in the present instance Goble or Nehalem Junction, which is practically the same place) and *accepted* a pass to the camp, and boarded defendant's locomotive for the camp. The testimony here does not indicate an authorization to the employment agency to make an *absolute contract of hiring.*"

Applying the facts set forth in the stipulation filed in this case in the light of the above principle, we maintain that Mrs. Helen B. Henderson was not an employment agent, who having reason to believe that employment might be secured by hop pickers at the Horst Company's ranch, and without orders from the Horst Company, had sent Mr. and Mrs. Rogan to the Company's ranch, in the belief that desiring pickers, the Rogans on their arrival might obtain work in that capacity.

On the other hand we maintain that the facts set forth in the stipulation, read in the light of the above principle as announced by Mr. Justice McBride, permit the conclusion that Mrs. Helen B. Henderson was expressly employed and authorized and paid by the Horst Company to open a branch office of the Horst Company at 223 Morrison Street, Portland, Oregon, upon the approach of the harvest season in the year 1925, and was expressly authorized to employ persons for a particular job, viz., hop pickers,

who, under the terms of their employment, were to be transported by the Horst Company upon their arrival at Salem or Independence, to the Eola ranch belonging to the Horst Company, and upon arrival there were to be given a designated cabin in a particular camp.

Under the distinction pointed out by Mr. Justice McBride, we maintain that the contract of hiring between the Horst Company and the Rogans became an absolute completed contract at Portland, Oregon, on August 5, 1925, because on that date Mrs. Henderson, the duly appointed and paid agent of the Horst Company, while in the temporary office of the Horst Company at Portland, and pursuant to express authority given her by the Horst Company, hired the Rogans to become hop pickers at the Eola ranch, assigned them to a particular cabin in a particular camp, for which they paid a valuable consideration, and as a part of the contract of employment agreed that the Horst Company would furnish transportation from Salem to the ranch.

Inasmuch as counsel for the Insurance Company has relied so extensively on the Wells decision, we feel warranted in calling the Court's attention to further statements appearing in Justice McBride's opinion, as in our opinion they are particularly applicable to the circumstances surrounding the employment of Mr. and Mrs. Rogan.

1. On page 288 Justice McBride holds that while

an employer directs an employment agent to supply him with labor, the employer is not bound to accept the labor so furnished, if for good and sufficient cause he sees fit not to do so.

Mrs. Henderson was not an employment agent. Mrs. Henderson was the Horst Company, in that she was the duly appointed and paid Portland agent, with power to employ persons for a particular job—that of hop picking. The Horst Company was therefore bound by the acts of Mrs. Henderson, so long as they were within the scope of her authority.

2. Judge McBride held that an employment agent's contract with an applicant is not to furnish employment, but to "give information by which the applicant shall be entitled to secure a situation". When an applicant leaves the office of an employment agent no contract of hiring has been executed, but merely a contract that the information the agent has furnished is correct, and if not that the money paid by the applicant will be refunded.

On the other hand, Mrs. Henderson actually employed the Rogans for a particular job, at a particular place. The contract she entered into with the Rogans was one of employment on behalf of a principal, for a definite time and place, and under definite terms.

3. Justice McBride likewise finds (page 289) that the very form of an employment agent's ticket, as well as a consideration of Section 6732 Oregon

Laws, under which they are issued, discloses that the mere giving, or the presentation thereof at the place and time designated therein, does not complete the employment. The ticket must be presented to the employer, and filled out and endorsed by him, in the event the applicant is not given employment.

The result is that when one with such a ticket presents himself to a prospective employer, under the terms of the law he is not yet under actual employment.

On the other hand the Rogans were in no such situation. They possessed no such ticket. They were under no obligation to secure any further confirmation from the Horst Company. They were already *employees* of the Horst Company, having agreed to perform a particular job, and possessing a receipt entitling them to a certain cabin in a specified camp.

4. Justice McBride then discusses Section 6733 (page 289), finding that it merely provides certain criminal penalties for giving false information by an employment agent, or for frivolous refusal by an employer to accept a prospective worker when sent. Under this section an applicant after arrival, and upon looking the ground over and seeing the surroundings, could decline to engage himself or herself to work; or it might well be that the prospective employer, after seeing and appraising the capabilities of the applicant, would come to the conclusion that such a person was not one which he would desire to

have in his employment. There was no legal obligation under the employment ticket or under the law, imposed on the applicant to work, or the employer to accept, if either reasonably deemed it undesirable.

On the other hand such conditions did not exist in the Rogan case. Upon arrival they could have refused to work, but they could not have legally recovered the money paid for their cabin, and by their refusal they would have been guilty of a breach of contract. The Horst Company could have refused to have permitted them to work, and they could have sued the Horst Company for any damages which they might have suffered. From the stipulation it must be apparent that the appraising of the capabilities of any applicant to pick hops, or to use a more colloquial expression, the "culling out" of undesirables, had already been performed by the agent of the Horst Company at Portland.

5. A further distinction between the principles involved in the Wells case and the Rogans case is found in the holding of Justice McBride (p. 289) that the rights of all parties connected with an employment agent's ticket or receipt are statutory, and it would not be competent for the Legislature to create a contract under which only one of the parties is bound. Yet such would be the case if an employer was bound as a matter of contract to accept the services of an applicant, under a penalty for refusal to do so, while an applicant, after presenting himself,

and appraising the situation, was not bound to enter upon the labor. The remedy given an applicant under Section 6733 for frivolous rejection does not sound in contract, but is purely statutory, and in tort.

On the other hand, the rights of the Rogans and of the Horst Company were not the creatures of legislative enactment, but were based on the principles of a civil contract, mutually entered into at Portland, Oregon, on August 5, 1925, and the remedy for breach thereof was neither dependent on an Oregon statute, nor would it have involved a single principle of the law of torts.

6. The giving of a pass upon defendant's logging road from Nehalem Junction to its camp and headquarters farther back in the timber did not, according to Justice McBride (p. 289), constitute an acceptance of Miss Wells' services, this being merely a method adopted by Clark & Wilson to avoid the liability of being a common carrier, and because it was more convenient for the company to have applicants *"come to headquarters than to meet and appraise and bargain with them at the Junction, where nobody authorized to make a contract was employed."*

On the other hand, the Horst Company was not operating a railroad. In supplying automobiles to haul its pickers from Salem and Independence to its ranch it was not only consulting its own convenience, but was spending money for the sole purpose of hav-

ing an additional inducing element in its contract of employment. More important still, the Horst Company did not supply automobiles to bring people to the Eola Ranch, where they might be met and appraised and bargained with. The appraising and bargaining with the Rogans occurred in Portland, where Mrs. Helen B. Henderson, the authorized and paid agent of the Horst Company, was located.

7. Miss Wells, according to Justice McBride, (p. 290) was in the position of an invitee, and from a consideration of the terms of the employment slip, the pass over the defendant's road, and the testimony of the defendant's witnesses, her legal status and that of the Clark & Wilson Company at the time of the accident was this: The manager of Clark & Wilson Company said to Miss Wells, "We want a competent and suitable waitress to come to our place of business, and if you are competent and suitable we will hire you at a certain wage."

On the other hand, from a consideration of the circumstances surrounding the employment of the Rogans at Portland on August 5th, and of the status of the Rogans at the time of the accident on August 29th, to paraphrase the language of Justice McBride, the Horst Company may be considered to have said to the Rogans:

> "We want two thousand competent hop pickers to work on our ranch at Eola. We have opened an office in Portland, at the Coffey & Sheehy Hardware and Sporting Goods Store,

> 223 Morrison Street. As a part of our contract of employment we will haul you and your baggage from Salem and Independence to our ranch, and return you upon the completion of the harvest. Call at our Portland office, and if you are competent and suitable we will hire you, and assign you a certain cabin in one of our camps, for which you will pay One Dollar, to be refunded if you remain throughout the harvesting."

8. Counsel for the Insurance Company also contended that the Rogans were not employees on August 29th, the date of the accident, because their work was not to commence until September 1st. Counsel overlook the fact that one may be a *present employee,* although the actual work incident to the employment may not begin until a future date. This very important principle was laid down in the Wells case, the principal authority relied on by the Insurance Company, in the following language (p. 290):

> "One may be under such a contract with another as to be a present employee, although the actual work incident to the employment may not be begun until a future date."

It must be obvious, therefore, that the Rogans became employees of the Horst Company at Portland, on August 5, 1925, although actual work incident to their employment was not to begin until September 1, 1925.

We have taken the time to analyze this remarkably clear and well reasoned decision of Justice McBride, not only because it is one of the principal cases on which the Insurance Company relied, but

we have likewise set forth many of the arguments found in the Wells decision because they develop by their very antithesis the facts which distinguish the Wells from the present case, and inevitably lead to the conclusion that there was a completed contract of employment between the Rogans and the Horst Company to the extent that on August 5, 1925, at Portland, Oregon, the Horst Company bound itself unreservedly by word and act to accept and pay for the services of the Rogans, and to supply them with a particular cabin in a certain camp, and that transportation from Salem to the ranch would be provided, and the Rogans bound themselves unreservedly by word and act to work as pickers on the ranch of the Horst Company.

Putnam Decison Distinguished

Counsel relied on *Putnam v. Pacific Monthly,* 68 Ore. 36, in their argument in the lower court. This decision can be distinguished in many ways from the present case. The first distinction is found in the language of Justice McBride in his opinion on the re-hearing, when he said (p. 55):

> "This is not a case like many of those cited in the opinion (Judge Burnett's initial opinion in the Putnam case), where a laborer going to his work is injured in the course of transportation."

A further distinction is found in the fact that the plaintiff in the Putnam case had been denied the right, as administratrix of the deceased employee, to

recover against the employer for death caused by an elevator accident, because the elevator was used by the public, and the employee was therefore as much a passenger as any other person using it. This is a situation totally different from the instant case, as is must be conceded that the automobile truck which caused the injury to the Rogans was being used exclusively, pursuant to one of the terms of the contract of employment, to transport employees of the Horst Company from Salem to the ranch.

Time Doctrine Discredited

Counsel for the Insurance Company stressed in support of their demurrer that phase of the Putnam decision in which Justice McBride held that because the duties of the deceased began at 8:30 in the morning, and the accident happened at 8:20, at the time of the accident her time was her own, and hence she was not a servant of the defendant, and could not recover.

The doctrine that one is not a servant at the time an accident happens, if it happens a few minutes before such person is required to begin service, has been severely criticized and overruled in numerous recent decisions.

Mr. Justice Sutherland, in the recent case of *Cudahy Packing Company v. Parramore,* 16 Utah 161, 207 Pac. 148, 263 U. S. 418, 68 L. Ed. 366, 370, held that no importance should be attached

> "To the fact that the accident happened a few minutes before the time Parramore was to begin work, and was therefore to that extent outside the specified hours of employment. The employment contemplated his entry upon the departure from the premises, as much as it contemplated his working there, and must include a reasonable interval of time for that purpose."

In *Novack v. Montgomery Ward & Company* (Minn. 1924) 198 N. W. 290, it was claimed that because the employee was at the place where she received her injuries at 7.40 o'clock and was not required to begin work until 8:00 o'clock A. M., and that hence not having assumed her duties, and the relation of master and servant not having begun, there was no liability. Mr. Justice Wilson pushed aside this argument in the following language:

> "We cannot so hold. This employee reached the premises twenty minutes ahead of time to begin work. This was in the winter time. We do not know how far she had to travel and contend with winter traffic, and her promptness is more to her credit than being one minute late. We hold that upon reaching the premises of the employer twenty minutes before eight o'clock she was there within a reasonable time at that season of the year, and that upon her arrival upon the premises within such reasonable time she might become subject to and was entitled to the benefits of the compensation act, and that she was in the elevator at the time of her injury 'during the hours of service'."

In *Stratton v. Interstate Fruit Company* (May, 1924), So. Dak., 199 N. W. 117, 119, the Court said:

> "It is immaterial whether it was ten minutes after one o'clock, when by the terms of his employment he (plaintiff) was required to be at work, or ten minutes before one o'clock, when he was by the terms of his employment off duty."

In *Indian Hill Club v. Industrial Commission* (Ill. 1923), 140 N. E. 871, 873, Mr. Justice Dunn pushed aside a similar argument in this language:

> "It is not essential to the right to receive compensation that the employee should have been working at the particular time that the injury was received. The employment is not limited to the exact moment when he begins work, or when he quits work. * * * An injury accidentally received on the premises of the employer by the employee, while going to or from his place of employment by a customary or permitted route, within a reasonable time before or after work, is received in the course of, and arises out of the employment."

In *Roberts Case* (Me. Nov., 1924), 126 Atl. 573, Mr. Justice Wilson held that the course of one's employment does not begin and end with the actual work one is employed to do, but includes the period between the entering of an employer's premises a reasonable time before beginning his actual work, and a reasonable time within which to leave the premises after the day's work is done.

A reading likewise of the following cases will disclose that this startling ten-minute doctrine announced in the Putnam case is not sustained by recent cases:

Jeffries v. Pitman Moore Company, 147 N. E. 919, 921;

Brink v. Wells Lumber Company, 201 N. W. 222, 223;

City of Milwaukee v. Industrial Commission, 201 N. W. 240;

Barres v. Watterson Hotel Company, 244 S. W. 308.

Susznik Decision Distinguished

Counsel for the Insurance Company quoted from the Susznik decision (76 Ore. 189, 147 Pac. 922, Ann. Cas. 1917-C 700) in support of their contention that the Rogans were not employees fo the Horst Company at the time they were injured.

Briefly, the Susznik case is to be distinguished from the Rogan cases in the following respects:

Susznik was not employed by any agent of the Alger Logging Company, but applied for employment at the Evans Employment Company agency in Portland, and received the usual employment agent's ticket, giving him information that employment might be had with the Alger Logging Company. This fact alone distinguishes this case from the Rogan cases, in the same way that the Wells' decision was distinguished *supra.*

Mr. Justice Benson, in rendering the decision in the Susznik case, bases the conclusion therein reached on the ground that Susznik was not engaged in the employment of the Alger Logging Company at the time he was hurt (p. 925).

The direct contrary has been established in the present case.

Even though Susznik, however, had been an employee of the Alger Logging Company, the case could still be distinguished from the Rogan cases, and from the legal principle on which we are here primarily relying, because as a second affirmative defense to Susznik's complaint, the Logging Company alleged that Susznik had been transported by the Logging Company on its train from Skamokawa to its logging camp

> "gratuitously, and without consideration therefor, and *not in the performance of any contract, express or implied,* between the defendant and plaintiff to furnish the same to plaintiff on account of his being in defendant's employment, and not in partial payment or otherwise of any labor performed, or to be performed by plaintiff for defendant, but solely for the mutual benefit and convenience of plaintiff and defendant in connection with the business in which the defendant was engaged, and in which the plaintiff was employed."

It has been stipulated that under the terms of the contract between the Rogans and the Horst Company, the Rogans were to be transported without charge from the railway station at Salem to the Eola Ranch. (See Paragraph IV, Stipulation, R 50.)

Payment by the Pound Picked Immaterial

The fact that the Rogans were to pick hops at

an agreed rate per pound does not deprive the Rogans of the status of employees.

As held in *Amalgamated Roofing Co. v. Travellers Ins. Co.* (Ill.) 133 N. E. 259, 262:

> "Whether Colvin was an independent contractor or an employee of the appellant was a question of fact, upon which the evidence was disputed. The principal consideration in determining whether a workman is an employee or an independent contractor is the right to control the matter of doing the work . It is not the actual exercise of the right by interfering with the work, but the right to control which constitutes the test. * * * *The fact that payment is to be made by the piece or the job, or the day or hour, does not necessarily control, where the workman is subject to the control of the employer*, as an employee, and not as a contractor."

When Is One an Employee?

In *Employers' Indemnity Co. v. Kelly Coal Co.*, 149 Ky. 712, 149 S. W. 992, 41 L. R. A. (N.S.) 963, 967, Mr. Justice Miller, speaking of the test by which to determine whether a person is an employee, said:

> "Speaking generally, the *relation* may be said to *exist* whenever the *employer retains* the right to *direct* not only what shall be done, but *how* it shall be done. * * * (Citations.) The significant element in the relation of an employee and his employer is personal service. In Wood on Master & Servant, Sec. 317, it is said: 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether a person is acting as the servant of another is to ascertain whether, at the time when the in-

> jury was inflicted, he was subject to such *person's orders* and *control,* and was liable to be *discharged* by him for disobedience of orders or misconduct.' In other words, an 'employee' is one who works for and under the control of his employer."

In *Oregon Fisheries Co. v. Elmore Packing Co.,* 69 Ore. 340, 344, and in *Harvey v. Corbett,* 77 Ore. 51, 60, the Supreme Court of Oregon affirms the same principle in the following language:

> "The relation of master and servant exists whenever the employer retains the right to *direct* the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done."

From a reading of the pleadings and stipulation found in the abstract of record, can there be any question as to the right of the Horst Company to have directed both what the Rogans should do or how their work was to be done? Is it conceivable that the Horst Company was employing 2000 hop pickers to work on their ranches who were not to be subject to any order or control of the Horst Company, or that none of these 2000 pickers were liable to be discharged by the Horst Company for disobedience of orders or misconduct? Is it conceivable that when the Rogans reached Salem they could have insisted upon choosing just how and where they were going to place themselves and their luggage in the truck hired to take them to the ranch, and ignored any instructions from the agent of the Horst Com-

pany in charge of the truck and of their reception at Salem? Is it conceivable that the Rogans could have conducted themselves during the trip in the auto truck from Salem to the ranch in a manner directly in conflict with the orders of the Horst Company's agent? It is not. From the time of their arrival at Salem they became subject to the order and direction of the Horst Company, and this right of direction and control sustains our contention that the Rogans were employees of the Horst Company on the day the accident occurred.

II.

ACCIDENT AROSE OUT OF OPERATION INCIDENT TO WORK OF ROGANS

The second principle question shown by our opening statement to be involved in this case, is whether the accident can be said to have arisen from an operation incidental to the work of the Rogans. Counsel for the Insurance Company claim that it was not. Judge Bean held that because the Rogans, at the time of the injury, "were not working for the plaintiff in any capacity", it could not be said that "their injury occurred while they were at or about the work of the plaintiff as provided in the policy." (R. 75 and 89.)

Immaterial that Accident Happened Before Reaching Place Where Hops Were to Be Picked

Counsel for the Insurance Company, in support of their demurrer, contended that the accident from which the Rogans received their injuries, could not be said to have arisen out of or in the course of the Rogans' employment, or in an operation necessary, incidental or appurtenant thereto, because received while on their way to work, and before they had reached their employer's premises.

We admit the existence of the general rule that where an employee receives an injury by accident on his way to work, before he has reached the employer's premises, or on his way from work, after he has left said premises, the accident can not be said to

arise through, or out of, or in the course of the employment. This general rule is sustained in the following cases: *Universal Cement Co. v. Spirakis* (Ind.) 137 N. E. 276, 277; *Stockley v. School District No.* v (Mich.) 204 N. W. 715, 717; *Lampert v. Siemons,* 197 N. Y. S. 25, 26; *Dunn v. Trego* (Pa.) 124 Atl. 174; Roberts Case (Me.) 126 Atl. 573.

Exception to General Rule

In support of this contention, counsel for the Insurance Company quoted from 28 R. C. L. 805, the principle that if an employee gets up in the morning, dresses himself, and goes to work because of his employment; yet, if he meets with an accident before coming to the employer's premises, that is not a risk of his occupation, but of life generally, and such a workman is held not to be entitled to compensation for injuries occurring under such conditions.

Had counsel for the Insurance Company checked this quotation from Ruling Case Law, even to the extent of looking at the 1925 supplement of R. C. L. (5th Sup. p. 1570), he would have found a note, stating that this principle was subject to an exception, referring in support of said exception to *Lumbermens Reciprocal Association v. Behnken,* 112 Tex. 103, 246, S. W. 72, 28 A. L. R. 1402, and note thereto appended. Had he but glanced at the first sentence in this extended note he would have seen further reference to notes in 10 A. L. R. 169, 21 A. L. R. 1223, and 24 A. L. R. 1233, all of which notes set forth the

authorities sustaining the principle that where transportation is furnished an employee as an incident of his employment, and an injury is sustained during transportation, on a vehicle furnished by the employee, such *injury is held to have arisen out of and in the course of the employment.*

It is this exception to the general rule on which the Horst Company is basing its claim.

Exception to General Rule Defined

The best general statement covering all the contingencies where an injury is compensible as arising out of and in the course of the employment between employer and employee, no matter where it occurs, is announced in *Universal Cement Company v. Spirakis* (Ind.) 137 N. E. 276, 277. The rule is as follows:

> "It may be stated as a general rule that where an employee receives an injury by accident on his way to work before he has reached his employer's premises, or on his way from work, after he has left such premises, the accident cannot be said to arise either out of or in the course of his employment.
>
> "There are a number of conditions, however, under which this general rule is not applicable, among which we note the following:
>
> 1. "It is not applicable where an employee is injured on the premises of another along a way which the parties contemplated he should use, as a means of ingress and egress to and from his work, and which he was so using at the time of his injury. (Citing cases.)
>
> 2. "Or if, at the time of such accident, the

employee is under the orders of his employer, or furthering his employer's interest." (Citing cases.)

3. *"Or if, at the time of such accident, the employee is being transported to or from his work by his employer, as a part of the contract of employment."* (Citing cases.)

Sala v. American Sumatra Tobacco Co., 93 Conn. (1918) 82, 83; 105 Atl. 346.

It would be difficult to find a case more precisely on all fours with the Rogan cases than the above.

The two women who were killed in the Sala case were being conveyed from one tobacco plantation, where they had finished their work under one employer, to commence work at another plantation, under a new employer. The automobile conveying the two women skidded, and they were killed. Proceedings were brought to secure compensation, and from an award an appeal taken. Mr. Justice Roaback, in deciding this case, held that the following questions were involved: (1) Did the injury arise in the course of their employment; (2) Did the injury arise out of their employment by the tobacco company; (3) Was a contract of employment entered into; (4) Was it a condition of the contract that the tobacco company would transport the decedents to the place of work.

In passing on these questions, the Court said:

"The decedents, with several other women, had been employed picking tobacco at the H. L.

Vietts tobacco plantation in Hazardville, in the town of Enfield. The American Sumatra Tobacco Company, the defendant, was then engaged in the business of raising, harvesting, and marketing tobacco, and among other places had a plantation in South Windsor, upon which, during the harvesting season, it employed women in large numbers. On the 24th day of September, 1917, the defendant tobacco company instructed its agent, Ralph E. Moody to employ some women who were quitting work at the Vietts plantation. The decedents were among these women, all of whom were foreigners and not well versed in the English language. Moody conferred with them, and told them, if they wanted work, to meet an automobile at the waiting station in the viallage of Thompsonville, in the town of Enfield, the next morning to be transported to the respondent's plantation in South Windsor. On the morning of September 25th, two automobiles, driven by Norman H. Stetson, garage and livery man in Thompsonville, who were regularly employed and paid by the tobacco company for that purpose, met the women at the waiting station in Thompsonville, and started for the respondent's plantation in South Windsor. On account of the slippery condition of the road, while upon the public highway in the town of South Windsor, one of the autos skidded, causing the death of the Sala and Scalia women and injuring several others.

"There is no difficulty in reaching the conclusion that at the time these women were injured there was a contract of employment existing between them and the American Sumatra Tobacco Company. A more serious question presented by the evidence is: Were they injured before this employment began? The rule has been established:

> 'That the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employee, and is one which the employees are required, or as a matter of right permitted, to use by virtue of that contract.' Donovan's Case, 217 Mass. 78, 104 N. E. 431.

"There was no direct evidence as to the time when the employment of these women began. The Compensation Commissioner inferred that their transportation was an essential part of the contract of employment, and reasonably incident thereto. There was evidence which reasonably supported such a conclusion. Although the decedents, at the time of the accident, had not actually commenced their work upon the tobacco plantation of the defendant company, it is plain that their transportation was a part of the contract of employment with this defendant. When they were injured they were not passengers, paying a stipulated fare for the conveyance to their work. The automobile which skidded and caused the accident in question was furnished and paid for by the defendant company. The relation that then existed between the women and the Sumatra Tobacco Company was that of master and servant, and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the tobacco company. *Pigeon v. Lane,* 80 Conn. 240, 67 Atl. 886, 11 Ann. Cas. 371; *Kilduff v. Boston Elevated Railway,* 195 Mass. 308, 309, 81 N. E. 191, 9 L. R. A. (N. S.) 873. This being so, the case is like *Swanson v. Latham et al.,* 92 Conn. 87, 101 Atl. 492, in which we stated that:

> 'An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment.'
>
> "There is no error."

Could there be a case more in point with the Rogan case than this case? Other than that the Rogans were to pick hops instead of tobacco, and that the girls were killed, while the Rogans were but seriously injured, the material facts in both cases are identical.

In both cases the employers owned ranches upon which during the harvest season, they employed pickers in large numbers.

In both cases prior to harvesting, the companies instructed their agents to employ pickers.

In both cases the agents interviewed the applicants, and told them, among other things, that if they wanted to work as pickers, to be at a certain place on a certain day, and that they would be transported to the respective ranches.

In both cases the applicants were present at the appointed places, where they were met by auto trucks driven by agents of the companies regularly employed and paid for by the companies, and on which they started for the ranches.

In both cases neither the deceased girls or the Rogans had even been on the ranches of the com-

panies. In other words, they were making their initial trip to the ranches, to go to work as pickers.

In both cases the employees were injured before they reached the ranches of the companies, and from alleged negligence of the companies' drivers.

It therefore follows that the conclusions reached in the Sala case inevitably apply to the Rogan cases, to-wit:

That at the time the Rogans were injured, there was a contract of employment existing between them and the Horst Company;

That transportation was an essential part of the contract of employment, and reasonably incident thereto;

That there is evidence which reasonably supports this statement;

That while the Rogans at the time of the accident had not actually commenced their work, it is plain that their transportation was a part of their contract;

That when the Rogans were injured they were not passengers paying a stipulated fare for the conveyance to their work;

That the automobile which caused the accident was furnished and paid for by the Horst Company;

That the relationship which then existed between the Rogans and the Horst Company was that of

master and servant, and not that of carrier and passenger;

That at the time the Rogans were injured they were laborers in the employ of the Horst Company;

That all these facts make the Rogan cases like that of *Swanson v. Latham et al.*, 92 Conn. 87, relied on in the Sala decision, in which it is stated that

> "An injury received by an employee while riding pursuant to his contract of employment, to or from his work, in a conveyance furnished by his employer, is one which arises in the course of and out of the employment."

Additional Authorities

The cases sustaining the exception to the general rule relied on by the Horst Company that an accident occurring during transportation to work arises out of the employment, if the transportation is a part of the contract of employment, are innumerable. We content ourselves with briefly referring to a few.

In *Littler v. Fuller Company,* 223 N. Y. 369, 371, the employees had refused to continue working unless free transportation to and from work and the railroad station was supplied. An automobile was hired, and on one of the trips, Littler was injured. The Court said:

> "The vehicle was provided by the employer for the specific purpose of carrying the workmen to and from the place of employment, and in order to secure their services. The place of injury was brought within the scope of the employment, because Littler, when he was injured,

> was 'on his way * * * from his duty within the precincts of the company.' The day's *work began when he entered the automobile* truck in the morning, and ended when he left it in the evening."

In *Swanson v. Latham,* 92 Conn. 87, the employer arranged to transport its employees from Willimantic, where they lived, to Stafford Springs, where the work was being done. While being transported Swanson was killed. The Court said:

> "The contract of employment between the decedent and the defendants required the decedent to work outside the place of his residence, Willimantic, if his employer should so desire; and the defendants agreed that while the decedent was at work at Stafford Springs, they, as a part of his contract of employment, would convey the decedent from his home to his work and back to his home each day, in an automobile provided by them. The work began when the decedent reached Stafford Springs. The employment began when the decedent boarded the automobile at Willimantic, and continued during the trip and during the work, and on the return trip to Willimantic. Transportation to and from his work was incidental to his employment; hence the employment continued during the transportation in the same way as during the work. The injury occurring during the transportation, occurred within the period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it. * * * An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished

by his employer is one which arises in the course of, and out of the employment."

Applying the above language to our case, we have this situation:

The contract of employment between the Rogans and the Horst Company required that the Rogans work outside of Portland, their place of residence. The Horst Company agreed, as a part of its contract of employment, to convey the Rogans from Salem to its ranch near Independence, and to return them to Salem at the completion of the harvest, in an automobile provided by the Horst Company. The actual work of hop picking was to begin when the Rogans reached Eola Ranch. The actual employment began when the Hogans boarded the automobile truck at Salem, and continued during the trip, and at the time the accident occurred. Transportation to and from the Eola Ranch was incidental to the Rogans' employment. Hence the employment continued during the transportation in the same way as it would have during the work. The injury occurring during the transportation, occurred within the period of their employment, at a place where the Rogans had a right to be, and while away they were doing something incidental to their work of hop picking, because contemplated by it. The injuries received by the Rogans while riding to their work, pursuant to their contract of employment, in a conveyance furnished by the Horst Company, therefore arose in the

course of and out of the employment, and while performing an operation necessary, incident or appurtenant or connected with hop picking, and consequently the employment or operation was the proximate cause of the injuries; hence the Horst Company, as employer, was liable.

In *American Coal Mining Co. v. Crenshaw* (Ind.) 133 N. E. 394, the Court after exhaustively discussing British and American decisions, reached the conclusion that an employer was liable where an accident occurred during transportation, if the transportation was supplied in compliance with an implied or expressed term of the contract, as such transportation became an incident to the employment.

In *Western Indemnity Co. v. Leonard,* 231 S.W. 1101, 1103, the employees were transportated from the city to the plant, and the Court held that such transportation "was as much a part of the contract as the compensation for the labor performed," the Court saying:

> "This transportation was 'incident' to Leonard's employment—was a part of the contract, and in fact a part of the compensation. * * * Leondard was on his way to his work, travelling in the usual way, over the route selected by his employer, and as directed by his employer. While not on his employer's premises, he was (on the train) in obedience to the orders of his employer, and was injured in the course of his obedience to such orders. The duties of his em-

> ployment did not end at the gates of the plant, for the employer had contracted to carry him back to the city. * * * *We conclude that Leonard's injury did originate in his work,* and was received in the course of his employment, and at the time of receiving such injury that he was engaged in the furtherance of his master's business."

In *Jones v. Casualty Reciprocal Exchange* (Tex.) 250 S. W. 1073, 1074, the Court held that the relationship of employer and employee exist during transportation; that the test applied to determine whether an injured person is an employee or passenger is that where the employee is being carried in the employer's conveyance to and from work, such party is an employee; but if carried merely for his own business, pleasure or convenience, he is a passenger.

In *Dunn v. Trego* (Pa.) 124 Atl. 174, it was contended that Dunn must either have been injured on the premises of the employer, or have been actually engaged in furtherance of the business of the employer. Chief Justice Moschzisker denied this contention, holding that the terms of the employment included transportation, and that when the claimant was thus being transported he was actually *engaged in the furtherance of the business of the employer,* as the employment began when the men were being carried to work in the morning, and it did not terminate until they had been returned to Philadelphia in the evening.

In *Lampert v. Siemons,* 197 N. Y. S. 25, 26, Mr. Justice Hinman sustained the exception relied on by the Horst Company that where an employer sends a conveyance to meet the employee, and brings him to the place of actual employment:

> "He is held to be constructively in the course of his employment while so riding, * * *. The employer in such a case is deemed to have assumed to extend the precincts of the employment to the vehicle used by him as a part of the contract of his employment."

In this connection see likewise *Distefano v. Standard Ship Building Corporation,* 196 N. Y. S. 452, 453, where under similar circumstances the Court held "that the employer's plant was in a way extended so as to include the conveyance."

In *Dominguez v. Pendoia,* (Cal.) 188 Pac. 1025, 1026, the Court sustained the principle contended for here, making the further comment that if the deceased had been riding upon a public conveyance, although on his way to work, he would have been subject to the same dangers as any other member of the general public, but when he entered a vehicle provided by his employer, he entered not as a member of the public, but as an employee, and the dangers to which he was thus exposed were dangers to which he was exposed not as a member of the public, but because he was an employee, and that hence the danger was an incident to his employment, and arose out of his employment, and was within the scope thereof.

The principle that an employer is liable for injuries to employees occurring during transportation supplied by the employer under the terms of the contract of employment, is also sustained in the following cases: *Zurich General Accident & Liability Co., Inc. v. Brunson,* 15 Fed. (2nd) 906, 908; *Harrison v. Central Construction Co.,* 135 Md. 170, 108 Atl. 874, 112 Atl. 627; *Knorr v. Central Railroad of N. J.* (N. J.) 110 Atl. 797; *Kirby Lumber Co. v. Scurlock* (Tex.) 246 S. W. 76, 78; *McClain v. Kingsport Improvement Corporation* (Tenn.) 245 S. W. 837, 838; *Rock County v. Industrial Commission,* (Wis.) 200 N. W. 657; *Decamp v. Youngstown Municipal Railway Co.* (Ohio) 144 N. E. 128, 129; *Roberts Case* (Me.) 126 Atl. 573.

Workmen's Compensation Cases in Point

In their argument in the lower court counsel for the Insurance Company criticised our use of decisions involving construction of Workmen's Compensation laws, claiming that such decisions were not applicable.

We take direct issue with counsel on this contention.

1. Counsel relied in the lower court on the Susznik and the Wells decisions, *supra,* both of which involved the question of whether the employees therein came within the terms of the Oregon Compensation Act. Counsel likewise relied on and quoted extensively from 28 Ruling Case Law, 760, where

the subject of Workmen's Compensation Act is treated. It is difficult to understand how they expected to rely on such decisions and treatise on workmen's compensation acts, and deny us a like privilege.

2. It is our contention that the rules which apply to employment contracts generally, are applicable in determining whether the contract which must underlie the application of the workmen's compensation law, exists. Hence, while the Horst Company case does not involve the Oregon Workmen's Compensation Act, compensation cases which discuss the question of whether claimants therein were employees at the time of the accident, or whether the accident occurred while at or about the work of the assured, or any operation necessary, incidental or appurtenant thereto, are in point in determining the present case.

3. The decision in *Kackel v. Serviss,* 167 N. Y. S. 348, is in point on this question. In that case, the Court said:

> "The question *whether there is a contract of employment* is jurisdictional, and due process of law requires that this fact shall be determined judicially; *that the rules which apply to contracts generally shall be applied in determining whether the contract which must underlie the operation of the workmen's compensation law, exists,* and this is a question of law, dependent upon established facts."

4. Reference to the very treatise on workmen's compensation acts found in Ruling Case law, and quoted from so extensively by counsel in their argument in the lower court, will disclose that the same rules for determining whether one is an employee, and whether the injuries were incurred within the course and scope of the employment, or in an operation necessary, incident or appurtenant thereto, under the common law, are used in determining the same questions under the state compensation acts. For instance:

> "A contract of employment is contemplated by the statutes, and between the parties to an alleged contract it must be shown that there existed a privity defined by the common law." (28 R. C. L. 737.)
>
> "While it is true that workmen's compensation acts are liberally construed, being remedial statutes, there are reasonable limitations upon the rule." (755.)
>
> "In order to warrant payment of compensation under the workmen's compensation acts, it is essential there should have existed at the time of the calamity a *contract of employment between the claimant and the alleged employer.* * * * The relation of master and servant must have been established in accordance with the recognized legal standards." (760.)
>
> "In determining the meaning of the phrase 'arising out of and in the course of' the employment, the courts have been compelled to refer to the old common law rules of master and servant. The old precedents, then, are still applicable." (802.)

We therefore submit that workmen's compensation cases, in so far as they discuss whether the injured claimant was an employee, and whether the accident arose out of and in the course of the employment, or in an operation necessary, incident or appurtenant thereto, are applicable to the present case.

III.
JUDGE BEAN'S RULINGS

We have heretofore referred to the rulings of Judge Bean, in which he sustained the demurrer filed by the Insurance Company. (R. 62, 71.)

We now propose to briefly analyze these rulings in the light of the facts and the legal principles discussed in this brief.

Important Phase of Liability Clause Ignored

We concede the correctness of Judge Bean's statement that "the rights of the parties to this litigation must be determined by the terms of the liability contract". (R. 64) *Imperial Fire Insurance Co. v. County of Coos,* 151 U. S. 452, 38 L. Ed. 231, 235.

We concede as far as it goes the correctness of a further statement of Judge Bean:

> "To entitle the plaintiff to recover, therefore, it is essential that it appear (1) that the injured party was, at the time of his injury, an employee of the plaintiff, and (2) that the injury was the result of an accident while such party was 'at or about the work of the plaintiff'." (R. 74)

We most earnestly submit, however, that all the important terms of the policy should be considered in determining the rights of the respective parties.

The words "at or about the work" are taken by Judge Bean from the liability policy. (R. 17) Judge Bean, however, ignored a very vital clause when he thus quoted from the policy, viz., under this policy the Insurance Company agreed to indemnify the Horst Company

> "against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries suffered as the result of an accident occurring while this policy is in force, *by an employee* or employees of the assured, *while at or about the work of the assured* described in warranty four, which for the purpose of this insurance *shall include all operations necessary, incident or appurtenant thereto, or connected therewith,* whether such operations are conducted at the place defined and described in the warranties, *or elsewhere,* in connection with or in relation to such work places."

We confidently contend that the two conditions essential to recovery under this liability policy are:

1. That the party at the time of his injury was an employee of the Horst Company; and

2. That the injuries were the result of an accident occurring while the policy was in force, and while the employee was at or about the work of the assured, which for the purpose of the insurance shall include "all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work place defined and described in the warranties, or elsewhere, in connection with or in relation to such work places." (R. 17)

We therefore submit that the lower court had no right to thus limit liability of the insurance company to accidental injuries to an employee occurring while the employee was hop picking. This limitation is too narrow. The policy defines and broadens the phrase "at or about the work of the assured" by stating that for the purpose of the insurance such phrase shall include "all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in the warranties, or lsewhere, in connection with or in relation to such work places." (R. 17)

Furthermore, the lower court ignored another phase of the policy. As a general rule liability policies confine the area of employment within certain

definite limits. This policy, however, did not itself limit liability to those accidents which occurred on the Eola Ranch. Under Item 2 of the warranty the area covered by the policy was "anywhere in Marion and Polk Counties, Oregon." (R. 30)

In *Kalamazoo Auto Sales Co. v. Travellers Insurance Co.,* 198 N. W. 579, 582, it was contended that the accident did not occur at the plant of the insured. The Court said:

> "The policy does not itself limit liability to those accidents which occur at the location of the garage fixed at a definite place in Items 3 and 6, and we should not so limit it by construction.
>
> "* * * The policy is to be considered in its entirety, and if it is ambiguous must be construed most strongly against defendant, having been prepared by it. We should not indulge in a strict construction to defeat liability, and should take into consideration the policy as a whole, and indulge in such construction as will give it force for the purpose it was intended to serve."

It should require no argument to prove the injustice which the Horst Company has suffered when the lower court failed to consider the liability clause of the policy in its entirety. That the court did fail to thus consider the policy is obvious. The above quotation from Judge Bean's memorandum opinion not only proves that this is so, but we submit the erroneous conclusion reached by the court is proof

positive that the court failed to give consideration to the entire clause.

Injury Occurred in An Operation Incident to Work

After stating the two essentials for recovery, to-wit, that the injured parties should have been employees, and that the injury should have been the result of an accident while the party was at or about the work of the Horst Company, Judge Bean made this comment:

> "The Rogans were not at or about the work of the plaintiff at the time of their injury. It is true that they were being transported by the plaintiff to the place where they were to work, but they were not to begin work until two days after their injury. At the time of their injury, they were not working for the plaintiff in any capacity. Therefore, it cannot, in my judgment, be said that their injury occurred while they were at or about the work of the plaintiff, as provided in the policy." (R. 74)

We have already shown that the Rogans were employees under a definite contract of employment at the time the accident happened. We have already shown that the Rogans were in the truck which caused the injury, pursuant to an express condition of their contract, they were to be transported from Salem to the Eola Ranch.

It therefore follows that the injuries occurred within the period of their employment, at a place where they might reasonably be, and in fact under

their contract of employment required to be in fulfillment of one of the duties of their employment.

Even conceding, as stated by Judge Bean, that at the time of the accident they were not actually at or about the work of hop picking, they were certainly performing an operation necessary, incidental or appurtenant thereto, or connected therewith. An essential prerequisite to hop picking was the getting there. While performing this necessary and incidental operation the Rogans were injured.

For one to say that the actions of the Rogans in boarding the truck, on August 29, 1925, pursuant to the terms of their contract, was neither appurtenant nor connected with the work for which they were employed is simply to ignore the admitted facts in this case.

If the Rogans, at the time of the accident, were not doing something incidental, appurtenant or connected with their work, then what were they doing, and why were they there?

As said in *Swanson v. Latham,* 92 Conn. 87, quoted above,

> "The injury occurring during the transportation, occurred within the period of the employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment, because contemplated by it."

Or in the words found in *Western Indemnity Co. v. Leonard,* 231 S. W. 1101, 1103, quoted above,

"This transportation was 'incidental' to Leonard's employment—it was a part of the contract, and in fact a part of the compensation. * * * Leonard was on his way to his work, travelling in the usual way, over the route selected by his employer, and as directed by his employer. While not on his employer's premises he was (on the train) in obedience to the orders of his employer, and was injured in the course of his obedience to such orders. The duties of his employment did not end at the gates of the plant, for the employer had contracted to carry him back to the city. * * * We conclude that Leonard's *injury did originate in his work,* and was received in the course of his employment, and at the time of receiving such injury that he was engaged in the furtherance of his master's business."

The language of this Court in the recent case of *Zurich General Accident & Liability Ins. Co. v. Brunson, et al.,* 15 Fed. (2nd) 906, 908, with but immaterial modification, could be applied to the point we are here stressing:

"The appellee was doing what he might reasonably do at the time and place. He was at a place where he was required to be. *Stark v. Ind. Accident Comm.,* 103 Or. 80, 204 p. 151. *He was doing what was reasonably incident to the employment.* The risk was not unnecessarily increased. He did not choose an unnecessarily dangerous place. He acted like any reasonably prudent man employed in like manner would under the same circumstances. No reasonable mind upon consideration of all the circumstances can fail to see a causal connection between the conditions under which the work was required to be performed and the work he was

engaged for and required to do, the act that he was doing and the resulting injury."

Hop Picking Not Started Immaterial

Judge Bean stated that the Rogans were not to begin work until two days after their injury. We have already seen that this could not affect their status as employees, because, as shown above, one may be a present employee, although the actual work incident to the employment may not begin until a future date. *Wells v. Clarke & Wilson Lumber Co.*, 114 Ore. 297, 235 Pac. 283, 290.

This fact furthermore could not place them beyond the terms of the policy, because the policy not only covered an accident while at or about the work of hop picking, but in an operation necessary, incidental or appurtenant thereto, or connected therewith, and irrespective of whether such operation was conducted at the place defined and described in the warranties or elsewhere, in connection with, or in relation to such work place.

Term "All Operations" Important

Inasmuch as this policy covered injuries suffered by employees, not only while "at or about the work of the assured," but "all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in the warranties, or elsewhere in connection with or in relation to such

work places" (R. 17), the meaning of the term "all operations" becomes important.

As defined by the Century Dictionary, the word operations is a "course of action or series of acts by which some result is accomplished".

The action or series of acts by which the Horst Company secured the truck in question, placed it in charge of one of its employees as a driver, the driving of the truck to the Southern Pacific Railway Station at Salem, the gathering together of its employees who arrived at the station, the placing of them, together with their luggage, on the truck, and the transporting of them to the Eola Ranch, represented a course of action or series of acts by which E. Clemens Horst undertook to fulfill its contract previously made with its employees, and also constituted a series of acts by the Horst Company necessary, incident and appurtenant to the work of hop picking, in that it was the series of acts by which the Horst Company was getting its pickers to its ranch.

The case of *Hoven v. West Superior Iron & Steel Co.,* 93 Wis. 201, 208, 32 L. R. A. 388, 390, was one in which an employee working in an iron and steel plant was injured by the fall of a girder, which was raised by an independent crew engaged in building an addition to the plant.

The employers' liability policy in this case contained a provision similar to that contained in the

Horst Company's policy, in that it provided against liability for injuries to employees in *"all operations"* connected with the business of iron and steel work.

The Insurance Company contended that liability was restricted to injuries to employees while engaged in operations connected with the business of iron and steel works; that is, in the operating department of the business, as distinguished from business like that of constructing necessary buildings. This is similar to the conclusion reached by Judge Bean, viz., that because the Rogans were injured while being transported by their employer to work, they were not within the terms of the insurance policy.

In answering this contention, Mr. Justice Marshall said:

> "To be sure, plaintiff was injured while at work in the operating department, by the fall of a girder which was being raised to its position by an independent crew engaged in building an addition to the works. Therefore, if the labor of constructing such an addition, under a proper interpretation of the policy, is not an operation connected with the business of iron and steel work, appellant is not liable."

In affirming the judgment against the Insurance Company the Court said:

> "The general language of the contract, "All occupations connected with the business of iron and steel works,' is not restricted by anything in the conditions indorsed on the policy or any paper referred to or made a part of it. If the in-

> tention was to restrict such language to operations in any particular department, or to any particular branch of the business, or to any particular instrumentalities used in such business, it was easy to have said so in unmistakable language. The assurer saw fit to use, under the circumstances, a broad and liberal construction in favor of the objects for which the policy was taken out, and by so doing the conclusion is easily reached that it covers the operation of constructing a building for the use of the assured in its business, as one of the operations connected with such business."

If it had been the intention of the Insurance Company to restrict its liability under the Horst Company's policy to accidents occurring to employees while actually picking hops at the Eola Ranch, it would have been easy to have said so in unmistakable language. The Hartford Accident and Indemnity Company saw fit, however, to use much broader language, and from the language as so used in its policy the conclusion is easily reached that it covers an injury resulting from an accident occurring to an employee while either at or about the work of hop picking, or any operation necessary, incident or appurtenant thereto, or connected therewith, whether conducted at the Eola Ranch, or elsewhere.

Furthermore, the Hoven decision gives a much broader construction to the indemnity policy involved in that case than is required in our case. In the Hoven case the employee, at the time of his injury, was engaged in the manufacturing department,

and was injured by the falling of a girder being raised by an independent crew constructing a building. In other words, the employee was not actually involved in the operation which caused the injury. In our case the Rogans were actually involved in the operation which caused their injury, and the operation itself had a direct connection with the work which they were hired to perform.

In *Western Indemnity Co. v. Toennis,* (Tex.) 250 S. W. 1098, the indemnity policy stated that it was to cover the business of paper hanging, and contained a further provision that

> "This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations, which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work place designated and described in said declaration, or elsewhere, in connection with or in relation to such work places." (1099)

An employee was injured while painting in connection with the paper hanging job. The employer claimed that the painting was necessary, incident and appurtenant to and connected with paper hanging. The Court sustained this contention, and affirmed an award against the insurance company.

In *Employers Indemnity Corporation v. Felter,* (Tex.), 264 S. W. 137, 144, one Felter was employed as a meter reader, and received injuries in a collision

while in the course of his employment. In discussing whether he came within the terms of the employers' liability policy, the Court said:

> "We think it not material whether he was reading meters at the particular place of the injury, on that particular day. He was there not on a mission of his own. * * * Whether or not he had reached the place where he began recording the actual meter readings, we think he was, in the language of the statute, 'engaged in or about the furtherance of the affairs or business of his employer'. * * * We think clearly that Felter at the time of his injuries, as found by the jury, was engaged 'in the course of his employment', within the meaning of said act, and under the policy issued pursuant thereto." (Page 144)

Necessary, Incident, Appurtenant Considered

If the Court will apply the obvious meaning to the terms "necessary operation, incidental operation, and appurtenant operation" it cannot escape the conclusion we are here seeking to prove and express.

As used in the liability clause the word "operation" is subordinate to the term work. Thus the clause reads:

> "While at or about the *work* of the assured, * * * which shall include all operations * * * whether conducted at the work place defined * * * or elsewhere." (R. 17)

The word "operation" is in turn limited by additional terms in the clause.

The operation must be necessary or incidental or

appurtenant or connected with the work of the employee, but need not be conducted at the work place defined in the warranties." Inasmuch as the "location" covered by the policy is anywhere in Marion and Polk Counties, and the accident occurred in Marion County, this last limitation requires no further consideration.

A necessary operation in connection with the work of the Rogans is one reasonably requisite as a means of accomplishing the work which the Rogans were to perform. An incidental operation is one subordinate to a principal operation. An appurtenant operation is likewise an operation belonging or relating to, but subsidiary to a more important operation. A connected operation as applied to the work which the Rogans were to perform meant an operation closely associated with such work.

In the light of these definitions can it be said that the operations or actions of the Rogans in getting to their work was not an operation necessary or incidental or appurtenant or connected with their work,—never forgetting that the operation was under the control of their employer and pursuant to an express term of the then existing contract of employment.

Opposing counsel will contend that the actual work had not yet begun, and could not begin until two days after the Rogans received their injuries.

We have already discussed this point under the heading of "Time doctrine discredited".

The argument may be further thus answered:

An injury occurring in an operation necessary, incident or appurtenant to the work of hop picking presupposes that the actual work of hop picking is not being performed. If the operation was one of hop picking it could not, at the same time, be an operation incidental to hop picking. It would be hop picking.

The policy itself contemplates, therefore, an operation other than that of hop picking, and covers such an operation if it be necessary, or incidental, or appurtenant, or connected with the operation of hop picking, and the party injured therein be an employee.

Above Principles Applied to Present Case

If the facts pleaded in the amended complaint of the Horst Company, (R. 76), or admitted in the stipulation (R. 48), are considered in the light of the legal principles discussed herein, we maintain the following conclusions have been established:

1. That the Rogans were employed by a duly authorized and paid agent of the Horst Company at Portland, Oregon, on August 5, 1925;

2. That the Rogans were being transported to work at the time of the accident, August 29, 1925, as a part of their contract of employment;

3. That because the accident happened on a county road, away from the premises of the Horst Company, is not conclusive against the existence of a casual relationship between the injury and the work for which the Rogans were employed, as in contemplation of law the employer having supplied the truck, is assumed to have extended the precincts of the employment to the auto, or that the employer's ranch was in a way extended, so as to include the conveyance.

4. That the Rogans, when injured, were not passengers, paying a stipulated fare for conveyance to their work, but that the auto was furnished and paid for by the Horst Company for the specific and sole purpose of carrying workmen, without payment by them, to and from Salem to the place of employment, in order to secure their services, and while the Rogans were not obligated to travel on the truck, it was only by virtue of being employees, and pursuant to their contract of employment that they were permitted to use the truck as a means of conveyance to their work.

5. That transportation to work being incidental to their employment the employment continued during the transportation, in the same way as during the work.

6. That the injuries occurring during the transportation, occurred within the period of their employment, and at a place where the Rogans had a

right to be, and while they were doing something incidental to their employment, because contemplated by it.

7. That the injuries arose in the course of the employment, consequently the employment was the proximate cause of the injuries.

8. That the auto truck was hired by the Horst Company is immaterial, since it was an instrumentality used by it in its business, and designated to be exclusively used on this occasion for carrying out the agreement with the Rogans and other employees.

9. That the matter of transporting the Rogans was as much a part of the contract of employment as the compensation for the labor to be performed.

10. That the truck was travelling over the usual route selected by the Horst Company, and under the control directly of the Horst Company.

11. That the employment of the Rogans did not begin and end at the gate of the Eola Ranch, for the Horst Company had contracted to carry the Rogans from and to Salem, as a part of their contract, and any injury occurring during the transportation was therefore received in the course of the employment and in an operation incidental to their work.

12. That it is immaterial whether the Horst Company had expressly obligated itself to furnish the Rogans transportation from Salem to the ranch, or whether the Rogans had a mere implied right to

use the transportation, as in either event the right was an incident to the employment, and in making use thereof the Rogans were performing a duty of their employment, the use of the transportation facilitating the Horst Company's business, and the injury occurring at the time when the Rogans were authorized or expected to be exposed to the danger, a danger not shared in by any one but employees; hence the injuries were received while in the furtherance of the employer's business.

13. That the logic and reason of charging the Horst Company for the injuries to the Rogans occurring while riding on an auto truck provided by the company is because the Horst Company had such truck under its control, could inspect and repair it, could provide a competent and careful driver, and was obligated to look after such a conveyance, as it was obligated to look after the safety of its premises where the employees were at work.

14. That if the Rogans had been riding on a public auto stage, although on their way to work, they would have been subjected to the same dangers as any other member of the general public, and their injuries would have been suffered as members of the general public, and due to a risk which they, in common with other members of the public, ran; but when the Rogans entered an auto truck provided by their employer, for the sole purpose of conducting them to the place of their employment, they entered that ve-

hicle not as members of the public, but as employees of the Horst Company. In other words, the dangers to which the Rogans were exposed in riding in the truck, alleged to have been unprotected, and without guards or rails, and driven by a negligent driver, were dangers to which they were exposed, not as members of the public, but because and only because they were employees of the Horst Company; hence the dangers were incidental to their employment, arose out of their employment, and were within the scope thereof.

15. That the indemnity policy of the Insurance Company by its very terms contemplated the covering of injuries occurring not only while the Rogans were at or about the work of the Horst Company, but while engaged in any operation necessary, incident, appurtenant or connected with such work, and in this respect was much broader in its scope than if it had provided merely against liability for injuries occurring while employees were actually performing work specifically described in the warranties of the policy.

16. That inasmuch as the Rogans, pursuant to their contract of employment, were being transported to work in a truck under the control of their employer at the time of their injuries, and were not present as mere individuals on their way to seek employment, they were engaged in an operation necessary, or incidental, or appurtenant, or connected with the work for which they were employed.

CONCLUSION

Based upon these conclusions, which we have drawn from the facts appearing in the Horst Company's amended complaint and in the written stipulation entered into between counsel, and in the light of the principles discussed herein, we contend that the Hartford Accident and Indemnity Company, defendant in error herein, is liable under its policy to the Horst Company, plaintiff in error, and the demurrer should have been overruled.

Respectfully submitted,

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